March 8, 2022

Women's *Charter* Equality before the Supreme Court of Canada: Where Do We Stand as of International Women's Day 2022?

By: Jonnette Watson Hamilton & Jennifer Koshan

Matter Commented On: International Women's Day 2022

March 8 is International Women's Day (IWD), a day on which we assess the progress towards achieving women's rights. The theme this year is "Break the Bias." We are encouraged to "Imagine a gender equal world. A world free of bias, stereotypes, and discrimination. A world that is diverse, equitable, and inclusive. A world where difference is valued and celebrated." When considering women's rights under Canadian law, we tend to use the lenses of discrimination and equality as the umbrella words rather than bias. Bias is certainly one form of discrimination, but discrimination also includes the harms of stereotyping, prejudice, and disadvantage. The right to equality and to be free from discrimination based on protected grounds is guaranteed under s 15 of the *Canadian Charter of Rights and Freedoms*, Canada's constitutional equality guarantee.

Section 15 of the *Charter* came into effect on April 15, 1985, three years after the rest of the *Charter*, in order to give governments time to amend their legislation and policy to comply with their new obligations. This section is the result of years of hard work by women's and other equality-seeking groups (for a discussion see e.g. Mary Eberts, "The Fight for Substantive Equality: Women's Activism and Section 15 of the *Canadian Charter of Rights and Freedoms"* (2015) 37(2) Atlantis 100). Because of their poor experiences with equality rights under the *Canadian Bill of Rights*, SC 1960, c 44, these groups knew what they wanted to see in the new constitution in order to achieve their goals of transformative substantive equality, as we will elaborate on below.

Despite these efforts, however, women lost each of the first four cases of sex discrimination that they brought to the Supreme Court of Canada (*Symes v Canada*, [1993] 4 SCR 695, 1993 CanLII 55 (SCC) (*Symes*); *Native Women's Association of Canada v Canada*, [1994] 3 SCR 627, 1994 CanLII 27 (SCC) (*NWAC*); *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66 (CanLII) (*NAPE*); *Health Services and Support-Facilities Subsector Bargaining Association v British Columbia*, 2007 SCC 27 (CanLII) (*Health Services*)). The first win for women on the ground of sex discrimination did not come until 2018, 33 years after s 15 came into effect (*Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 (CanLII) (*Alliance*)). That win was followed by another loss that same year (*Centrale des syndicats du Québec v Quebec (Attorney General)*, 2018 SCC 18 (CanLII) (*Centrale*)), and then by a second win in 2020 (*Fraser v Canada (Attorney General)*, 2020 SCC 28 (CanLII) (*Fraser*)).

Women also lost 7 out of the 8 cases they brought to the Supreme Court that focused on other grounds of women's inequality, such as age, marital and family status, and sexual orientation (*Thibaudeau v Canada*, [1995] 2 SCR 627, 1995 CanLII 99 (SCC); *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, 1999 CanLII 674 (SCC); *Nova Scotia (Attorney General) v Walsh*, 2002 SCC 83 (CanLII); *Gosselin v Quebec (Attorney General)*, 2002 SCC 84 (CanLII); *Hodge v Canada (Minister of Human Resources Development)*, 2004 SCC 65 (CanLII); *Withler v Canada (Attorney General)*, 2011 SCC 12 (CanLII); and *Quebec (Attorney General) v A*, 2013 SCC 5 (CanLII); for the one win see *M v H*, [1999] 2 SCR 9, 1999 CanLII 686 (SCC)).

In total, there have only been two successful sex discrimination claims by women under the *Charter*'s equality guarantee at the Supreme Court of Canada to date, and only one case that was successful on other grounds.

In this post, we discuss some of the key wording and concepts that women mobilized around in the early 1980s and how those ideas played out in some of the equality cases that women brought under s 15. We conclude with comments on what seem to be the continuing barriers to the achievement of the goals set for women's equality 40-some years ago.

History, Concepts, Cases

Formal Versus Substantive Equality

Women's and other equality-seeking groups ensured that the equality rights in s 15 went beyond the *Canadian Bill of Rights* meagre guarantee of "equality before the law and the protection of the law" (at s 1(b)) by adding protections for equality *under* the law and equal *benefit* of the law. They also lobbied to change the heading for s 15 from "Non-discrimination Rights" to "Equality Rights" for a more positive rights approach that they hoped would require governments and courts to remedy inequality in the substance of laws (see Eberts, *supra*).

Once s 15 came into effect, women continued their advocacy through strategic equality rights litigation, primarily through the Women's Legal Education and Action Fund (LEAF). Their vision of what we now call substantive equality was recognized in the Supreme Court of Canada's first s 15 decision in 1989, *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 1989 CanLII 2 (SCC). *Andrews* was not a sex equality case, but it accepted that equality in s 15 meant substantive equality, which it defined as the idea that meaningful equality may require that individuals and groups be treated differently depending on their characteristics and situations. However, this basic understanding – while promising more than formal equality – is not enough; if substantive equality is to make a difference in women's lives, it must also include the eradication of systemic inequalities.

Formal equality is the more common understanding of equality. It requires that every person and group receive the same treatment, or at least that those who are similarly situated be similarly treated. Formal equality claims have been more successful in the Supreme Court of Canada. For example, the only successful claim out of eight claims brought by women on grounds other than sex was the 1999 *M v H* case. It was a formal equality claim based on an argument that excluding former same-sex partners from spousal support provisions violated s 15 based on sexual

orientation – in other words, it was a claim to be treated the same as former opposite-sex partners. *M v H* was an important win for many 2SLGBTQI individuals, but it has to be noted that it succeeded in part because it saved the government money, shifting a financial burden from the state to individuals.

Direct / Indirect (Adverse Effects) Discrimination

It has proven to be even harder for courts to see indirect (adverse effects) discrimination as opposed to direct discrimination, but indirect discrimination must be recognized in order to deal with systemic discrimination. In direct discrimination cases, the law draws a line between groups on the basis of a protected ground, the most common being age. In indirect discrimination cases, the law is neutral on its face, formally treating all individuals and groups the same, but it has an adverse or negative impact on groups identified by protected grounds. An understanding of indirect discrimination recognizes that groups may need to be treated differently to achieve equality, and this recognition is thus an illustration of substantive equality.

The 2004 case of *Newfoundland (Treasury Board) v NAPE* (*NAPE)* is an example of direct discrimination. *NAPE* challenged legislation that suspended a pay equity agreement between the government as employer and the union that would have seen women workers' pay adjusted upward so that women received equal pay for work of equal value. The government conceded that suspending this agreement violated women's equality rights but its argument that the violation was justified by the province's fiscal situation was accepted by the Supreme Court of Canada. This decision illustrates how even in cases of direct discrimination, equality rights are not absolute and governments can impose reasonable limits on these rights under s 1 of the *Charter*. In doing so, however, the government – and the Court – placed a disproportionately greater burden for addressing the province's financial situation upon women workers.

NAPE was the first of three pay equity cases that the Supreme Court of Canada has heard, which is not surprising as pay equity is necessary to redress systemic discrimination against women and the undervaluation of their work. Also not surprising is that these cases involve relatively privileged women represented by unions who can afford equality litigation.

Symes v Canada, the first s 15 challenge brought on sex discrimination grounds in 1993, is an example of indirect or adverse effects discrimination. In *Symes*, a self-employed lawyer challenged *Income Tax Act* provisions that allowed the deduction of expenses incurred for the purpose of gaining or producing income from business. This requirement was neutral on its face, but had been interpreted by the courts to allow taxpayers to deduct golf club membership dues and expensive cars in order to earn income from business, but not child care expenses. This indirect discrimination claim argued that the unavailability of a deduction for child care had a disproportionate and negative impact on women who bore a disproportionate share of the child care burden. The claim was denied on the basis there was insufficient evidence to show that women also disproportionately *paid* child care expenses. Allowing Symes' claim for a redistribution of economic benefits could have been ground-breaking, possibly facilitating a reclassification of child care as a public, not private, matter. This case illustrates how recognition of adverse effects discrimination is necessary in order to tackle the systemic disadvantage that women face in disproportionately bearing the burden of child care.

Systemic Discrimination

In *CN v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 at 1139, 1987 CanLII 109 (SCC) (*Action Travail*) – a human rights rather than *Charter* case – the Supreme Court of Canada defined systemic discrimination in the employment context as "discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of 'natural' forces." Systemic discrimination can be connected to both direct discrimination (e.g. failing to hire women for jobs that are seen as "men's work", as was the case in *Action Travail*) and to indirect or adverse effects discrimination (e.g. failing to accommodate women's childcare needs, as was the case in *Symes*).

The first sex discrimination case that women won in the Supreme Court of Canada was *Alliance*, decided in 2018. This was the Court's second pay equity case and a direct discrimination claim. Like all pay equity cases, it also raised systemic discrimination issues given continuing patterns of job segregation and the undervaluation of "women's work". In *Alliance*, a 6:3 majority held that changes in *An Act to amend the Pay Equity Act*, SQ 2009, c 9, amending Quebec's *Pay Equity Act*, CQLR c E-12.001, violated s 15 and could not be justified under s 1. The amendments, which were made because employers were not complying with the original legislation, replaced employers' continuous obligation to implement pay equity with a system of pay equity audits every 5 years and removed almost all possibility of retroactive compensation if there was pay inequity in those 5 years.

Section 28 of the *Charter* was also argued in *Alliance*, but the Supreme Court did not refer to it. Section 28, which guarantees that all rights in the *Charter* apply equally to women and men, was added to the *Charter* due to the efforts of equality-seeking groups in the early 1980s (see Kerri A Froc, "Is Originalism Bad for Women - The Curious Case of Canada's Equal Rights Amendment" (2015) 19:2 Rev Const Stud 237). Although it has seldom been used, its guarantee is becoming more important because the lobbying by women's groups succeeded in ensuring that s 28 was not affected by the use of the notwithstanding clause in s 33 of the *Charter*. This is important in the challenge to Quebec's religious symbols law by Muslim women, about which we will say more later.

The outcome in *Centrale* – the 3rd pay equity case heard as a companion case to *Alliance* – paralleled the outcome in *NAPE*: a violation of s 15 was found by a 5:4 majority based on a six-year delay in implementing pay equity in workplaces where there were no male comparators (such as in child care) as compared to workplaces where there were male comparators. As in *NAPE*, however, the delay was found to be justified under s 1 of the *Charter* by all but McLachlin CJ.

The second of two sex discrimination cases that women won in the Supreme Court of Canada was *Fraser* in 2020. Unlike *Symes*, *Fraser* was a win in an adverse impact discrimination case. The claimants were female RCMP members who lost their entitlement to full pension benefits when they entered temporary job-sharing arrangements. Members on temporary leave without pay could receive full pensions by buying-back pension credits for their time on leave, but job-sharers could

not. It must be noted that "buy-back" meant that the person on leave paid both the employee and the employer's share of pension contributions on their return to full-time employment, making the cost to the public purse a minor one. The inability to buy-back pension benefits disproportionately affected women who were RCMP members because it was primarily women with young children who job-shared. In a highly contested decision, a 6:3 majority found that job-sharers' inability to buy back their pensions perpetuated sex discrimination in pension plans and violated the *Charter* equality guarantee, a violation for which the government offered no pressing and substantial objective. The majority found that it was unnecessary to consider the claimants' alternate ground, family/parental status, making *Fraser* a missed opportunity to formally recognize the intersecting grounds of discrimination at play. Although *Fraser* is an important recognition of systemic discrimination against women in the employment context, it does not go as far as *Symes* would have, given that the cost implications for the government are minimal.

Intersectionality

Equality seeking groups pressed the government to make the list of protected grounds under s 15 open-ended and to add mental and physical disability as enumerated grounds in order to create greater opportunities for intersectional analyses of women's inequality. In addition, s 35(4) of the *Constitution Act, 1982* was added in 1983 to guarantee Aboriginal and treaty rights equally to male and female persons. As we just mentioned above in our discussion of *Fraser*, the Supreme Court of Canada did not make intersectionality a part of its analysis in that case, but this is also true of all of the equality cases brought by women so far. There are zero cases where a majority of the Court has formally analyzed women's intersecting inequalities using multiple protected grounds. In *Fraser*, the majority held that "a robust intersectional analysis of gender and parenting … can be carried out under the enumerated ground of sex" (at para 116). However, the premise of intersectionality is the need to recognize more than one axis of oppression and understand the qualitatively different experience of inequality that can exist at the intersection of grounds.

In 1994, the Native Women's Association of Canada (NWAC) sought an equal right to participation and funding at the constitutional negotiations that eventually led to the Charlottetown Accord, after the federal government funded four national Indigenous organizations that NWAC argued did not represent the interests of Indigenous women nor share their concern that the *Charter* should apply to Indigenous governments. Their claim focused on an equal right to freedom of expression under ss 2(b) and 28 of the *Charter*, with sex discrimination under s 15 playing a more minor role. Their claim at the Supreme Court failed due to what the Court saw as insufficient evidence showing that NWAC had been deprived of the opportunity to express their views to the government. A majority of the Court accepted that Indigenous women "face racial and sexual discrimination which impose serious hurdles to their equality" (at para 72) but the decision did nothing to address the intersecting inequalities and lack of status historically experienced by Indigenous women at the hands of the colonial state. The case was also a missed opportunity to give effect to ss 28 and 35(4).

There are more opportunities for intersectional analysis and the use of s 28 currently before, or on their way to, the Supreme Court of Canada. The Court granted leave to appeal 14 months ago in *R v Sharma*, 2020 ONCA 478, leave to appeal granted, 2021 CanLII 1101 (SCC), and it will be heard on March 23. *Sharma* is a challenge under ss 7 and 15 of the *Charter* to a two-year mandatory

minimum sentence that made conditional sentences unavailable to Ms. Sharma, who is an Indigenous woman. NWAC and LEAF are among the 20+ organizations who are intervening in the appeal. There are as yet no Supreme Court decisions recognizing the inequalities experienced by racialized women, and the Court has an opportunity to address this deficiency in the *Sharma* case.

There is also the challenge to Quebec's Bill 21 (*Act respecting the laicity of the State*, CQLR c L-0.3), which prohibits state employees such as prosecutors, police officers and teachers from wearing religious symbols – including head and face coverings – when carrying out their civic duties. This Bill invoked the *Charter*'s s 33 notwithstanding clause and in the challenge, *Hak c Procureur général du Québec*, 2021 QCCS 1466, the equal guarantee of freedom of religion to men and women under s 28 is playing a major role. *Hak* is currently before the Quebec Court of Appeal, but many observers expect it will eventually be heard by the Supreme Court of Canada.

Conclusion – Issues Going Forward

In the future we expect to see courts continue to struggle with several issues. One issue concerns the kind of evidence needed to prove a discrimination claim, particularly in adverse effects claims. The idea that the law must be the cause of the discrimination at issue has figured prominently in recent dissents at the Supreme Court. Just as the court said in *Symes* almost 30 years ago that the government did not *cause* the disproportionate child care burden that women bear, the dissent in the pay equity cases argued that the government did not *cause* the pay inequity problem in the private sector and the government could have chosen not to intervene at all. The challenged discrimination also cannot be the result of what the Court has seen as women's choices, such as the many cases about women's "choices" to live common law rather than marry, or what was called women's "choice" of work or child care arrangements in *Symes*. Although choice was discredited as a barrier to equality claims by the majority in *Fraser*, we expect dissenting justices might continue to (mis)use this notion to defeat women's claims.

Fraser and the Quebec pay equity decisions also revealed fundamental disagreements between the majority and dissenting justices about the extent of any positive obligations on government to redress social inequalities, with the perennial dissenters seeing *Charter* rights as fundamentally negative and, in particular, denying any positive duty to remedy inequality not caused by the government. Unfortunately, the majority in those cases did not take issue with the dissents' characterization of the nature of *Charter* rights. They held that it is only when the legislature has already acted that it must avoid discrimination, which is a very limited view of government obligations under section 15 of the *Charter,* and certainly not what equality seeking groups sought.

Positive obligations also bring up the issue of cost. The Supreme Court of Canada has shied away from holdings that will involve the redistribution of resources as *Symes* and other tax challenges would have. Women's wins under s 15 have occurred in cases where the government generally will not need to spend money to rectify the inequality. *Alliance* will only affect government spending in the case of government employers who do not pay women for their work of equal value, and in *Fraser*, the pension buy-back rights that the RCMP members sought are self-funded.

Justice Abella's comment in *Fraser* that inequality can be tackled "one case at a time" (at para 136) also illustrates the limited role of courts and litigation in resolving *disputes* rather than resolving *inequalities*. While governments must respond to judicial decisions that mandate changes to law and policy, and can redress women's inequalities even without litigation, we expect that equality claims will continue to be necessary and will continue to face legal and ideological uncertainty in the years to come.

This post is based on the authors' presentation at a University of Calgary International Women's Day 2022 panel discussion, and on research in a paper available here.

This post may be cited as: Jonnette Watson Hamilton & Jennifer Koshan, "Women's *Charter* Equality before the Supreme Court of Canada: Where Do We Stand as of International Women's Day 2022?" (March 8, 2022), online: ABlawg, http://ablawg.ca/wp-content/uploads/2022/03/Blog_JWH_JK_IWD_March_2022.pdf